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Martin Bergsmann

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EXAMINER

YAGER, JAMES C

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PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/587,076	Applicant(s) BERGSMANN ET AL.	
	Examiner JAMES YAGER	Art Unit 1794	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☐ Responsive to communication(s) filed on ____.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-11 is/are pending in the application.
- 4a) Of the above claim(s) ____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) ____ is/are allowed.
- 6) ☒ Claim(s) 1-11 is/are rejected.
- 7) ☐ Claim(s) ____ is/are objected to.
- 8) ☐ Claim(s) ____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on ____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☒ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. ____.
 3. ☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|--|---|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. ____. |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>20060721</u> . | 6) <input type="checkbox"/> Other: ____. |

DETAILED ACTION

Claim Rejections - 35 USC § 112

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 2-4 and 8 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

Claim 2 recites the limitation "the PE core" in line 3. There is insufficient antecedent basis for this limitation in the claim.

Claim 2 is indefinite given that it is not clear if the "metallized polypropylene layer" is the same as the "metallized barrier layer" in claim 1. Further it is noted that if the layers are the same, the claim would be objected to under 37 CFR 1.75(c) as being of improper dependent form for failing to further limit the subject matter of claim 1 because the "metallized polypropylene layer" is optional in claim 2.

Claim 2 is indefinite given that it is not clear if the "PE core" is the same as the "HDPE layer" in claim 1. Further it is noted that if the layers are the same, the claim would be objected to under 37 CFR 1.75(c) as being of improper dependent form for failing to further limit the subject matter of claim 1 because the "PE core" may be a PE other than HDPE in claim 2.

Claim 3 is indefinite because it is unclear whether the "PE sheet" is the "PE core" or the "HDPE layer" or if these terms represent the same layer.

Claim 3 is indefinite given that it is not clear if the "PE sheet" is the same as the "HDPE layer" in claim 1. Further it is noted that if the layers are the same, the claim would be objected to under 37 CFR 1.75(c) as being of improper dependent form for failing to further limit the subject matter of claim 1 because the "PE sheet" may be a PE other than HDPE in claim 3.

Claim 4 recites the limitation "the PE layer" in line 2. There is insufficient antecedent basis for this limitation in the claim.

Claim 4 is indefinite given that it is not clear if the "PE layer" is the same as the "HDPE layer" recited in claim 1. Further it is noted that if the layers are the same, the claim would be objected to under 37 CFR 1.75(c) as being of improper dependent form for failing to further limit the subject matter of claim 1 because the "PE layer" may be LDPE or LLDPE in claim 4.

Claim 8 is indefinite because it recites the temperature value "60°", but does not recite units.

Claim Rejections - 35 USC § 102

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

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(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1 and 9-11 are rejected under 35 U.S.C. 102(b) as being anticipated by Tyler et al. (US 2003/0091774).

Regarding claim 1, Tyler discloses a container made from a laminate structure ([0002]) (i.e. a packaging film suitable for packaging of grain products and their preparations) wherein the film comprises a layer of HDPE ([0053]), a hot seal layer (Fig. 1, 42) and a metallized barrier layer (Fig. 1, 36 and 38). Given that the skin layer of Tyler is LDPE, it will function as a heat seal layer.

Regarding claims 9-11, Tyler discloses a method for packing using the container as set forth above.

The recitation that the sheet is used to package dried bulk goods; grain products, dried and/or roasted fruit or seeds, cores, kernels or tuber crop preparations; or cereals, nuts, corn kernels or potato chips, does not confer patentability to the claim since the recitation of an intended use does not impart patentability to otherwise old products. *In re Tuominen*, 671 F.2d 1359, 213 USPQ 89 (CCPA 1982).

5. Claims 1, 2, 4 and 7-11 are rejected under 35 U.S.C. 102(b) as being anticipated by Touhsaent (US 6,013,353).

Regarding claims 1, 2, 4, 7 and 8, Touhsaent discloses a metallized multilayer packaging film (C1/L50-55) (i.e. a packaging film suitable for packaging of grain products and their preparations) wherein the film comprises a core layer of HDPE (C2/L40-45), a surface treated skin layer adjacent to the core layer comprising isotactic

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polypropylene homopolymer (C3/L15-20) (i.e. metallized barrier layer) having an aluminum layer deposited in the skin layer (C4/L20-30, Fig. 1, surface treated polymer skin layer) and having a skin layer (i.e. a hot seal layer) on the core layer opposite the surface treated polymer skin layer (Fig.1) (i.e. wherein the side facing away from the hot seal layer has a metallized barrier layer), wherein a printed ink pattern is applied to the surface of the film (C7/L1-5) (i.e. the packaging sheet carries an imprint in the form of symbols, patterns or letters). Given that the skin layer of Touhsaent is LLDPE (C3/L28), it will function as a heat seal layer.

Although Touhsaent does not disclose that a coextrusion sheet is utilized for the production of the packaging sheet as claimed, it is noted that “[E]ven though product-by-process claims are limited by and defined by the process, determination of patentability is based on the product itself. The patentability of a product does not depend on its method of production. If the product in the product-by-process claim is the same as or obvious from a product of the prior art, the claim is unpatentable even though the prior product was made by a different process”, *In re Thorpe*, 777 F.2d 695, 698, 227 USPQ 964, 966 (Fed. Cir. 1985) . Further, “although produced by a different process, the burden shifts to applicant to come forward with evidence establishing an unobvious difference between the claimed product and the prior art product”, *In re Marosi*, 710 F.2d 798, 802, 218 USPQ 289, 292 (Fed. Cir.1983). See MPEP 2113.

Therefore, absent evidence of criticality regarding the presently claimed metallized coextrusion sheet being utilized for the production of the packaging sheet

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and given that Touhsaent meets the requirements of the claimed packaging sheet, Touhsaent clearly meet the requirements of present claim 2.

Although Touhsaent does not specifically disclose that the film has a gloss value according to DIN 67530 of > 40 at 60° , it is clear that since the film of Touhsaent is identical in composition and structure to the instantly claimed sheet, the film of Touhsaent will inherently possess the same gloss value.

Regarding claims 9-11, Touhsaent discloses a method for packing using the metallized multilayer packaging film as set forth above.

The recitation that the sheet is used to package dried bulk goods; grain products, dried and/or roasted fruit or seeds, cores, kernels or tuber crop preparations; or cereals, nuts, corn kernels or potato chips, does not confer patentability to the claim since the recitation of an intended use does not impart patentability to otherwise old products. *In re Tuominen*, 671 F.2d 1359, 213 USPQ 89 (CCPA 1982).

Claim Rejections - 35 USC § 103

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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7. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

8. This application currently names joint inventors. In considering patentability of the claims under 35 U.S.C. 103(a), the examiner presumes that the subject matter of the various claims was commonly owned at the time any inventions covered therein were made absent any evidence to the contrary. Applicant is advised of the obligation under 37 CFR 1.56 to point out the inventor and invention dates of each claim that was not commonly owned at the time a later invention was made in order for the examiner to consider the applicability of 35 U.S.C. 103(c) and potential 35 U.S.C. 102(e), (f) or (g) prior art under 35 U.S.C. 103(a).

9. Claim 3 is rejected under 35 U.S.C. 103(a) as being unpatentable over Touhsaent (US 6,013,353), as applied to claim 1 above, in further view of Poirier (US 2002/0098334).

Regarding claim 3, Touhsaent discloses all of the claim limitations as set forth above. Touhsaent does not disclose an adhesive between the PE sheet and the polypropylene sheet.

Poirier discloses a multilayer film ([0014]) comprising an HDPE base layer ([0018]), and a skin layer comprising polypropylene ([0028]) (i.e. polypropylene sheet)

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with a tie layer (i.e. an adhesive layer) between the HDPE layer and the polypropylene layer ([0018], Table 1). It is well known in the art that tie layers are used to provide good adhesion between layers.

Touhsaent and Poirier are analogous art because they both teach about multilayer films. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the tie layer of Poirier into the metallized multilayer packaging film of Touhsaent to provide a film having improved adhesion between the layers.

10. Claims 5 and 6 are rejected under 35 U.S.C. 103(a) as being unpatentable over Touhsaent (US 6,013,353), as applied to claim 1 above, in further view of Boehler et al. (US 5,858,487).

Regarding claims 5 and 6, Touhsaent discloses all of the claim limitations as set forth above. Touhsaent does not disclose that the packaging sheet comprises a radiation absorbing and/or electrically conductive coating applied over the entire surface or partially or wherein the sheet comprises a micro-wave absorbing layer.

Boehler discloses a laminated food wrap (C2/L36-39) comprising a susceptor layer made of metal (i.e. a radiation absorbing layer; microwave absorbing layer) (C4/L54-57). Boehler discloses that the susceptor layer converts microwave energy into heat and thereby heats the food item in the food wrap (C4/L57-60).

Touhsaent and Boehler are analogous art because they both teach about multilayer films. Therefore, it would have been obvious to one of ordinary skill in the art at the time the invention was made to incorporate the susceptor layer of Boehler into the

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metallized multilayer packaging film of Touhsaent to provide a film that has the advantage of being able to heat food products inside the film via microwaves.

Conclusion

11. The prior art made of record and not relied upon is considered pertinent to applicant's disclosure. Zuiki (JP 2002225175) discloses a multilayer laminate comprising an HDPE layer and a hot seal layer, but does not disclose a metallized barrier layer.

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to JAMES YAGER whose telephone number is (571)270-3880. The examiner can normally be reached on Mon - Thurs, 7:30am-5pm, EST, Alt. Friday off.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Callie Shosho can be reached on 571 272-1123. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

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Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

JY 9/02/08

/Callie E. Shosho/
Supervisory Patent Examiner, Art Unit 1794